IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2007 Session

ANGELA SCALF v. JUDY HARMON, ET AL.

Appeal from the Chancery Court for Coffee County
No. 05-268 John W. Rollins, Judge

No. M2007-00350-COA-R3-CV - Filed March 19, 2008

Following the death of her father, Angela Scalf ("Plaintiff") filed this lawsuit against Judy and Johnny Harmon ("Defendants") claiming they improperly converted property from her father's estate. The lawsuit was filed by Plaintiff in her individual capacity as the only beneficiary of her father's will with respect to the property at issue. After trial, the Trial Court concluded that Defendants had converted various items of property and entered a judgment accordingly. The judgment included an award of attorney fees. Defendants filed a motion to strike the award of attorney fees, which the Trial Court granted. Plaintiff appeals and claims that the Trial Court erred when it granted Defendants' motion to strike the previous award of attorney fees. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and ANDY D. BENNETT, J., joined.

Cynthia A. Cheatham, Manchester, Tennessee, for the Appellant, Angela Scalf.

Vanessa A. Jackson, Tullahoma, Tennessee, for the Appellees, Judy and Johnny Harmon.

OPINION

Background

This lawsuit was filed by Plaintiff alleging Defendants were liable for "conversion of property." For purposes of this appeal, the facts are undisputed. Plaintiff is the daughter of Billy Wayne Cornelison ("the Decedent"), who died on July 4, 2004. Defendant Judy Harmon is the Decedent's niece. Defendant Johnny Harmon is Judy Harmon's husband. The Decedent's estate was modest, consisting of a mobile home and some land, two vehicles, a few guns, and bank accounts and cash totaling approximately $8,000.

According to the complaint, before the Decedent's death, Defendants took over the Decedent's care and Johnny Harmon was given the Decedent's power of attorney in the event of the Decedent's incapacitation. The complaint then states[1]:

> [Plaintiff] is the only residuary beneficiary of the Decedent's Will in the aforementioned Estate and all personal property owned at the time of decedent's death passed to her.…
>
> That defendants are currently unlawfully in possession of several items and cash that belonged to [the Decedent] at the time of his death and subsequently passed to [Plaintiff].…
>
> Shortly before his death, [the Decedent] signed the titles to his two vehicles, a Toyota truck and Dodge Intrepid car and allowed the defendants to hold these titles as the defendants convinced him that otherwise the vehicles would be taken from him.
>
> Additionally, there is approximately $5000 in a bank account in [the Decedent's] name at AEDC Federal Credit Union in Manchester, Tennessee.
>
> [The Decedent's] wallet contained cash in the amount of approximately three thousand dollars ($3000.00)
>
> Several guns were taken from the home of [the Decedent] immediately following his death.…

The trial was held in January of 2006 on Plaintiff's conversion claims. Defendants were represented by counsel and contested the allegations of the complaint. Following the trial, the Trial Court entered a judgment for Plaintiff. The judgment provides as follows:

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[1] We have omitted the original paragraph numbering.

> Defendant[s], Judy and Johnny Harmon, are to return to the Estate of Billy Wayne Cornelison through its Executrix, Angela Scalf, $5,000 unlawfully in their possession.
>
> Defendant[s], Judy and Johnny Harmon, are to return to the Estate of Billy Wayne Cornelison through its Executrix, Angela Scalf, the equivalent NADA value of two vehicles. The two vehicles were a 1996 Toyota Tacoma pick-up truck with a NADA value at the time of conversion of $5,350 and the other vehicle was a 2000 Dodge Intrepid with a NADA retail value of $7,200 at the time of the conversion and this amount shall be awarded to the Estate.
>
> Defendant[s], Judy and Johnny Harmon, are to return to the Estate of Billy Wayne Cornelison through its Executrix, Angela Scalf, a .22 rifle, a .16 gauge shotgun and a Winchester 3030 gun if, and at such time as, these weapons are located.
>
> That Defendants, Judy and Johnny Harmon, shall pay the attorney fees of Plaintiff, Angela Scalf … in the amount of $6,650.00.
>
> That the amount of pre-judgment interest at the rate of 10% per annum from July 4, 200[4], until January 23, 2006, on the amounts due and owing from the amounts Defendants were unlawfully in possession of, the $5,000 and the NADA value of the two vehicles belonging to the Estate in the amount of $12,550 for a total of $17,550, equals $4,387.00 in prejudgment interest.
>
> The total amount of this judgment is $28,237.00….

Following entry of the above judgment, Defendants apparently filed a motion to strike the award of attorney fees. We note that this motion, as well as Plaintiff's response thereto, are not contained in the record on appeal. There is, however, a copy of the Order entered by the Trial Court granting the motion and striking the award of attorney fees from the judgment. This Order states:

> After an extended review of the file and research, the Court is compelled to follow the dictates of the decision in *Jimmy A. Duncan, et al. vs. Dianne DeMoss, 880 S.W.2d 388*, and amend the order entered on October 2, 2006 to strike the award of attorney fees.
>
> The Court notes in passing if there ever was a case where attorney's fees should be awarded for no reason other than equity and justice this case surely meets that criteria.

Plaintiff appeals, claiming that the Trial Court erred when it entered its order striking the previous award of attorney fees.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In the recent case of *House v. Estate of Edmondson*, — S.W.3d. — , 2008 WL 199724 (Tenn. Jan. 25, 2008), our Supreme Court explained that:

> Tennessee, like most jurisdictions, adheres to the "American rule." *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). The American rule provides that a party in a civil action may not recover attorney's fees absent a specific contractual or statutory provision providing for attorney's fees as part of the prevailing party's damages. *Id.*
>
> The American rule, which has been described by this Court as "firmly established in this state," *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000), is based on several public policy considerations. First, since litigation is inherently uncertain, a party should not be penalized for merely bringing or defending a lawsuit. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), *superseded by statute on other grounds*, Act of Jan. 2, 1975, Pub.L. No. 93-600, 88 Stat. 1955. Second, the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included paying the fees of their opponent's lawyer. *Id.* Third, requiring each party to be responsible for their own legal fees promotes settlement. *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 818 (Colo. 2002). Fourth, the time, expense, and difficulty inherent in litigating the appropriate amount of attorney's fees to award would add another layer to the litigation and burden the courts and the parties with ancillary proceedings. *Fleischmann*, 386 U.S. at 718. Thus, as a general principle, the American rule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case.

House, 2008 WL 199724, at *3, 4.

Plaintiff first claims that she should be awarded attorney fees because Johnny Harmon abused the confidential fiduciary relationship established by the power of attorney. *See Martin v.*

Moore, 109 S.W.3d 305, 313 (Tenn. Ct. App. 2003)("Although attorney fees should not be imposed where there is merely a technical fault on the part of the fiduciary, … the imposition of such fees on fiduciaries who deliberately use their position of trust to enrich themselves creates a disincentive to such behavior."). One clear but narrow exception to this rule under Tennessee law is when the power of attorney is executed, but never exercised. As explained in *Martin*:

> Our Supreme Court has recently announced a narrow exception to this rule. In *Childress v. Currie*, 74 S.W.3d 324 (Tenn. 2002), the Court ruled that if the power of attorney is executed, but not exercised, a confidential relationship does not arise as a matter of law.

Martin, 109 S.W.3d at 309.

In the present case, Plaintiff acknowledges that the power of attorney was never exercised by Johnny Harmon. According to Plaintiff:

> [The Supreme Court] has found an exception to the rule that a power of attorney gives rise to a confidential relationship. However, that exception should not apply in this case. In *Childress v. Currie*, 74 S.W.3d 324, [the Supreme Court] held that the power of attorney does not create a confidential relationship if it is not exercised. *Id*. at 329 (Tenn. 2002). In this case, however, the facts show that Johnny Harmon had every intention of using the Power of Attorney to remove property from the Estate. He did not exercise any authority through that document only because the attorney … [creating that document] had the foresight to limit it to the situation in which Mr. Cornelison became incapacitated.

We are unable to construe *Childress* in the manner suggested by Plaintiff. *Childress* unequivocally stands for the proposition that if a power of attorney is not exercised, no confidential relationship is created as a matter of law. This rule is not changed simply because the person with the power of attorney may have intended to use that document when it was created or at some point in the future. The power of attorney either was exercised or it was not. In this case, it was not. Therefore, the fact that Johnny Harmon held a power of attorney which was not used cannot form the basis for an award of attorney fees.

Plaintiff also relies on the following excerpt from the *Martin* opinion as an additional basis to award her attorney fees:

> [I]t is well established that a personal representative of an estate may be entitled to receive reasonable attorney fees from the estate, where the representative has advanced such fees, and the attorney's services have inured to the estate's benefit. *See* Tenn. Code Ann. § 30-2-606; *Wallace v. Collier*, 829 S.W.2d 696 (Tenn. Ct. App. 1992). We note that the litigation initiated and financed by Ms. Martin has resulted in

> the restoration to the estate of over $60,000, thus meeting the above requirements.

Martin, 109 S.W.3d at 313.

This argument by Plaintiff may have had some success if Plaintiff were seeking her attorney fees from the Estate. Plaintiff, instead, seeks her attorney fees not from the Estate, but rather the Defendants. This lawsuit for conversion was brought by Plaintiff in her purely individual capacity and not as the personal representative of the Estate. The Estate is not and never has been a party to this litigation. As a result, neither the Estate nor Plaintiff in her capacity as the Estate's personal representative have incurred any attorney fees related to this litigation.

Plaintiff cites us to no applicable statute or authority entitling her to an award of attorney fees for successfully prosecuting an ordinary conversion case in her individual capacity. Accordingly, we must affirm the judgment of the Trial Court on this issue.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Angela Scalf, and her surety.

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D. MICHAEL SWINEY, JUDGE